United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1047

To be argued by
JOHN E. JAY

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED OPTICAL WORKERS UNION LOCAL 408, affiliated with the INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

Plaintiff-Appellee,

—against—

STERLING OPTICAL COMPANY, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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IN THE

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UNITED OPTICAL WORKERS UNION LOCAL 408, affiliated with the INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

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-against-

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On Appeal from the United States District Court for the Eastern District of New York

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BRIEF FOR DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

This is an appeal by Sterling Optical Company, Inc., defendant-appellant, from the Final Judgment [JA 88a-89a][1] of the Honorable Chief Judge Jacob Mishler

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[1] References to the Joint Appendix being filed herewith are cited "JA", followed by the page number at which the cited material appears. Thus, "JA 88a" refers to page 88a of the Joint Appendix.

of the Eastern District of New York entered December 10, 1973, in United Optical Workers Union, Local 408, affiliated with the International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Sterling Optical Company, Inc., 73 Civ. 1444, —— F. Supp. —— . That Final Judgment ordered arbitration of the dispute involving contracting out of certain work under the collective bargaining agreement but declared that Article XXVIII - the only provision of the agreement expressly governing contracting out of work - is "null and void and of no effect" under Section 8(e) of the National Labor Relations Act [Ibid]. In his Memorandum of Decision [JA 90a-96a], dated December 6, 1974, Chief Judge Mishler rejected appellant's contention that the provision was only partially illegal under Section 8(e), held that the provision is totally void, and ordered arbitration of the entire dispute. The arbitration proceeding was stayed pending this appeal [JA 98a].

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court, in an action under Section 301 of the Labor Management Relations Act to compel arbitration pursuant to a collective bargaining agreement, has jurisdiction to determine the extent of legality of the "no-subcontracting" clause of the agreement under Section 8(e) of the National Labor Relations Act where that clause underlies the entire dispute sought to be arbitrated.

2. Whether the District Court properly concluded, as a matter of law, that the "no-subcontracting" clause of the collective bargaining agreement "to the extent that it permits subcontracting [only] to 'union establishments' [is] 'unenforcible and void'" under Section 8(e) of the National Labor Relations Act.

3. Whether the District Court erred in refusing to excise, under Section 8(e) of the National Labor Relations Act, only the illegal limitation of the "no-subcontracting" clause of the collective bargaining agreement without invalidating the entire "no-subcontracting" clause on the ground that such excision would excuse Sterling from bargaining with the Union, a matter which the Court further held is reserved to the arbitrator.

STATEMENT OF THE CASE

(1) The Nature of the Case

In this appeal, Sterling Optical Company, Inc. (hereinafter "Sterling") seeks reversal of the decision of the District Court dated December 6, 1973 and entered December 10, 1973 [JA 88a-89a] only insofar as the District Court invalidated completely - as "null and void and of no effect" - the entire Article XXVIII (the "no-subcontracting" clause) of the collective bargaining agreement between Sterling and United Optical Workers Union Local 408, affiliated with the International Union

of Electrical, Radio & Machine Workers, AFL-CIO (hereinafter "Optical Workers Union"). Sterling does not argue here, nor did Sterling contend in the Court below, that other grievances relating to the contracting out of certain work previously performed by some members of the Optical Workers Union at its Brooklyn, New York, facility were not subject to arbitration under the collective bargaining agreement. On the contrary, in the Court below, Sterling contended as it does in this Court, that Article XXVIII as modified to conform to the requirements of Section 8(e) of the National Labor Relations Act, leaves it to the arbitrator to decide the extent to which the parties intended that Sterling could continue to subcontract out bargaining unit work, based on such factors as the history of collective bargaining negotiations and past practice under the collective bargaining agreements as well as the damages, if any, resulting from the alleged violation of Article XXVIII, as so modified. Sterling's position is merely that the District Court erred in holding that Article XXVIII is void and unenforceable in toto. And, in so doing, the District Court misconceived the scope of the matters which the Federal common law of collective bargaining agreements accords to the arbitrator.

(2) The Course of Proceedings

This action was commenced on September 25, 1973 by Optical Workers Union seeking a declaratory judgment

and an order compelling arbitration of disputes arising out of the decision of Sterling to subcontract out certain laboratory work at its Brooklyn, New York plant, effective September 28, 1973, and for injunctive relief pending arbitration [JA 3a-7a]. Simultaneously, Optical Workers Union applied for a temporary restraining order, and moved for a preliminary injunction, to enjoin implementation of Sterling's decision [JA 29a-36a]. After oral argument, the District Court on September 28, 1973, denied plaintiff's application for temporary relief on the ground that Article XXVIII violated Section 8(e) of the National Labor Relations Act and on traditional equitable grounds [JA 37a-38a].

On October 3, 1973, Sterling filed its answer, with counterclaim, for, inter alia, a declaratory judgment that Article XXVIII of the collective bargaining agreement is unenforceable and void insofar as it limits Sterling's right to subcontract work only to those establishments having a contract with Optical Workers Union; that as written, Article XXVIII presents no proper issue for arbitration by way of judicial enforcement; and that, to the extent Article XXVIII is lawful, it acknowledges the right of Sterling to subcontract work covered by the collective bargaining agreement [JA 39a-42a]. Sterling simultaneously moved for partial summary judgment [JA 43a-70a]. Plaintiff filed its reply on October 17, 1973 [JA 71a-72a], and moved for summary judgment in its favor

[JA 77a-87a]. And, in the absence of disputed issues of material fact, the parties, on November 5, 1973, entered into a Stipulation of Facts [JA 73a-76a].

(3) Disposition in the Court Below

On December 10, 1973, the District Court filed its Memorandum of Decision dated December 6, 1973 [JA 90a-96a]. Initially, the Decision held that the District Court's small area of jurisdiction, under the Steelworkers trilogy,[2] leaves for judicial determination "whether the agreement provides for arbitration of the [labor] dispute", recognizing that any "doubt should be resolved in favor of arbitration. . ." [JA 93a].

However, in express reliance upon the decision of this Court in Todd Shipyards Corporation v. Industrial Union of Marine & Ship Workers, 344 F.2d 107 (2d Cir. 1965), cited by Sterling, the District Court concluded that the issue of whether the limitations against subcontracting contained in Article XXVIII of the collective bargaining agreement were "unenforceable and void" under Section 8(e) of the National Labor Relations Act was for the courts [JA 94a]. The District Court stated [JA 94a-

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[2] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358 (1960).

95a]:

> "The court here finds that the issue of whether Article XXVIII of the agreement contravenes Section 8(e) of the Act is not arbitrable. Todd Shipyards Corporation v. Industrial Union of Marine & Ship Workers, 232 F.Supp, 589 (E.D.N.Y. 1964), aff'd. 344 F.2d 107 (2d Cir. 1965). The court finds the agreement, to the extent that it permits subcontracting to "union establishments", to be 'unenforcible and void.' Section 8(e) of the Act. (29 U.S.C. §158(e)); Bakery Wagon Drivers & Salesmen, Local Union No. 484 v. National Labor Relations Board, 321 F.2d 353, 367 (D.C. Cir. 1963)."

Despite this language, the court below proceeded to invalidate the entire Article XXVIII, over the objections of Sterling, and, indeed, wholly ignoring any of the cases cited by Sterling in its Memorandum of Law.[3] In so doing, the District Court reasoned that deletion only of the illegal limitation necessarily gave Sterling the unlimited right to subcontract out work, and, therefore, relieved Sterling of any obligation to bargain collectively with the Union, as required by Section 8(a)(5) of the National Labor Relations Act, a matter which the Court stated was for the arbitrator [JA 95a]. The reasoning of the District Court, as expressed in its decision, was:

> "Sterling argues that only the limitation in clause XXVIII should be excised. Implicit in this argument is the interpretation that it has the unlimited right to subcontract work previously performed by laboratory employees. The

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[3] See Defendants Memorandum of Law, dated October 5, 1973, at pages 27 to 34.

> further implication is that it is free of any obligation imposed under Section 8(a)(5) of the Act. (29 U.S.C. §158 (a)(5)). The court rejects the argument. Whether Sterling has performed its statutory obligation and the consequences of any failure to do so are matters for the arbitrator. National Labor Relations Board v. Rapid Bindery, Inc., 293 F. 2d 170, 176 (2d Cir. 1961); Hawaii Meat Co. v. National Labor Relations Board, 321 F.2d 397 (9 Cir. 1963)." [Footnote omitted] [Ibid]

The District Court's opinion did not discuss the position of Sterling that the extent of Sterling's right to subcontract out work - either as to type of work or amount of work - are subjects for the arbitrator under the agreement.[4] Instead, inconsistent with its initial conclusion that the court's jurisdiction was limited, the District Court proceeded to determine that if the illegal portion of Article XXVIII were excised, then Sterling necessarily had the unlimited right to subcontract out work previously performed by bargaining unit employees. And having erroneously intruded into the area reserved for the arbitrator by making this determination, the District Court then conferred upon the arbitrator the question of whether Sterling had fulfilled its statutory duty under Section 8(a)(5) of the National Labor Relations Act to bargain collectively with the Optical Workers Union over its decision to subcontract out the disputed work.

[4] See, Defendant's Supplemental Memorandum of Law, dated October 10, 1973, at pages 3 to 13.

The District Court concluded by denying injunctive relief on the ground that plaintiff has an adequate remedy by way of arbitration, decreeing that Article XXVIII is null and void, and directing arbitration on all matters demanded by the Optical Workers Union [JA 96a].[5] However, the District Court stayed the arbitration pending the appeal [JA 98a].

STATEMENT OF THE FACTS

(1) The Collective Bargaining Agreement

For many years, at least since 1954, Optical Workers Union and Sterling have been parties to a series of collective bargaining agreements, the most recent of which was entered into as of April 30, 1973, and continues in effect until April 30, 1976 [JA 4a, 8a, 33a, 49a, 53a, 73a]. This agreement covers Sterling's many optical stores in the Greater New York Metropolitan Area, as well as the warehouse and optical laboratory at 160 Jay Street, Brooklyn, New York [JA 3a, 9a, 33a, 48a-49a, 73a]. The scope of the Agreement is defined in Article I as follows [JA 9a]:

> "The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees in the Sterling Optical Company, Inc., in Lake Success, New York, within the radius of fifty (50) miles from Columbus Circle in

[5] Inexplicably, as decreed by the Court below, all such matters include Article XXVIII [JA 27a-28a, paragraph 15] which the District Court found "null and void and of no effect" [JA 88a].

the City of New York, including but not limited to present shops located in Manhattan, Yonkers and Hempstead, with respect to rates of pay, wages, hours of employment and other conditions of employment, excluding Executives, Supervisors, Bookkeepers, Executive Secretaries, Merchandise Controllers, Porters and Hearing Aid Personnel. The following are the Departments.

(a) Optometrists;
(b) Receptionists, Office Staff, Clerical Personnel, Mail Clerks;
(c) Bench;
(d) Quality Control;
(e) Surface;
(f) RX;
(g) Dispensers (Sales and Deliveries);
(h) Errand Boys;
(i) Machinists and Machine Maintenance and Rebuilding (machine maintenance and repair now being done by other personnel to be continued)
(j) Stock Clerks"

In addition to the usual provisions governing union security, wages, hours and working conditions, the agreement contains provisions respecting the management of the business, for the eventuality of closing of operations and for the contracting out of work.

Thus, Article XXV(i) provides that Sterling retains the usual functions of management as follows [JA 18a]:

"The Employer shall have the full and complete right to direct the working force; to control plant operations; to schedule and assign work; to require employees to observe rules, and to determine the means, methods and processes of production and such

other rights as are usually Management's function. The exercise of these rights shall not derogate any of the provisions of this Agreement."

More particularly, Article XXVII acknowledges the right of Sterling to close a branch in the following language [JA 19a]:

"In the event the Employer chooses to close a Branch in which such persons were transferred to, such persons shall return to whatever branch in which they have established their original seniority rights from the last date of hire with the Company."

And most specifically, Article XXVIII acknowledges Sterling's right to subcontract out work but prohibits subcontracting out of bargaining unit work to employers not under contract with the Union as set forth in that Article. Article XXVIII reads [JA 19a, 74a]:

"It is agreed by and between the Parties that whereas the Employer send [sic] work out to be done in different establishments under different managements, therefore, upon signing of this Agreement all said work shall be sent to Union establishments."[6]

This precise provision has appeared in each successive agreement between Sterling and the Union without change since the very first collective bargaining agreement in 1954, which read as follows [JA 66a]:

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[6]The preamble of the collective bargaining agreement states that "United Optical Workers Union, Local #408, IUE, AFL-CIO, of 200 Park Avenue, South, New York, New York, hereinafter referred to as the 'Union'" [JA 9a].

"Article XXVIII

> It is agreed by and between the parties that whereas the Employer sends work out to be done in different establishments under different managements, therefore, upon signing of this agreement all said work shall be sent to Union establishments."

Finally, any dispute between the parties is subject to the grievance and arbitration provision of Article VIII of the agreement reading, in relevant part [JA 12a, 74a]:

> "Any and all grievances or disputes between the Employer and his employees which cannot be satisfactorily adjusted by a representative of the Employer and a duly authorized representative of the Union shall be referred to an Arbitrator to be selected by the American Arbitration Association whose decision in the matter shall be final and binding upon both Parties to this Agreement, even though one of the Parties shall fail to appear; and such award shall be enforceable in any Court of competent jurisdiction. Costs of arbitration shall be borne equally by the Parties.
>
> (a) Any grievances or disputes arising under the Contract which are not resolved within ten (10) days from the date either Party is informed by registered mail, shall be submitted immediately to Arbitration by the requesting Party as hereinabove provided."

(2) The Instant Dispute Over Subcontracting

About September 17, 1973, Samuel Gelb, Executive Director of Sterling, notified Union Business Manager Sebastian J. Rebaldo that Sterling had decided to subcontract the laboratory work at its Brooklyn plant located at 160 Jay Street, Brooklyn, New York, although the mail

clerks, stock clerks and certain other employees would continue their employment at the plant [JA 5a, 33a, 50a, 74a]. The decision was to be implemented in full at the close of business on September 28, 1973 [JA 5a, 35a, 50a, 74a].

Thereupon, Business Manager Rebaldo, sent a telegram to Sterling, requesting a meeting on Wednesday, September 19, 1973, at 7:30 P.M. to discuss Sterling's decision to subcontract out the work [JA 50a, 70a, 74a].

On September 21, 1973, Sterlings Executive Director Gelb met with Business Manager Rebaldo to discuss the subcontracting issue [JA 35a, 50a, 75a, 86a]. During this meeting, Rebaldo insisted that the subcontracting out of the work then being performed at Sterling's Brooklyn optical laboratory was in violation of Article XXVIII of the current collective bargaining agreement between Sterling and the Optical Workers Union unless the work were being sent to establishments under contract with the Optical Workers Union [JA 34a-35a, 50a, 75a].

No agreement on the subcontracting issue was reached at the meeting on September 21, 1973 [JA 5a, 35a, 50a-51a, 75a]. During the meeting, however, Union Business Manager Rebaldo presented Executive Director Gelb with a written demand for arbitration containing numerous issues [JA 5a, 24a, 26a-28a, 47a, 51a, 75a], including the following:

"15. Is the Employer violating

Article XXVIII of the parties' contract, by subcontracting out laboratory work performed by bargaining unit employees at the Brooklyn Plant to non-union establishments?" [JA 27a-28a]

The remaining 14 issues sought to be arbitrated concern alleged violations of other provisions of the agreement as a result of the subcontracting [JA 5a, 26a-28a, 35a, 47a, 51a, 75a]. Three days later, the Optical Workers Union requested arbitration of these issues by mail [JA 5a, 25a-28a, 47a, 51a, 75a]. On September 28, 1973, Sterling received notice from the American Arbitration Association that the Optical Workers Union had requested arbitration of the above enumerated fifteen issues [JA 51a, 75a].

Throughout, Sterling has resisted the Union's demand for arbitration insofar as it seeks to arbitrate issues or claims based upon any alleged violation of Article XXVIII since that Article is illegal - "unenforceable and void" - under Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §158(e), to the extent that the provision restricts subcontracting to establishments having a contract with the Optical Workers Union [JA 37a, 40a, 42a, 51a-52a, 75a, 94a].

SUMMARY OF ARGUMENT

The decision of the District Court, grounded on abundant legal authority of this Court and other Courts of Appeals, was clearly correct in determining that, in an action to compel arbitration under Section 301 of the Labor Management Relations Act, the District Court had jurisdiction to determine the legality of the "no-subcontracting" clause under Section 8(e) of the National Labor Relations Act where that clause is central to the dispute sought to be arbitrated. For, despite the limited area reserved to the courts in compelling arbitration of labor agreements, the explicit language of Section 8(e)[7] that an agreement exceeding the bounds of that Section is "to such extent unenforcible and void" compels the court to consider the legality of such a clause in connection with an application for enforcement of that clause. And no different conclusion is required because enforcement of such an illegal clause may also constitute an unfair labor practice

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[7] Insofar as relevant here, Section 8(e) reads:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other

(con't. on page 16)

within the jurisdiction of, and remediable by, the National Labor Relations Board.

Neither can there be any substantial question that the District Court properly concluded that Article XXVIII of the instant collective bargaining agreement exceeded the permissible limits of Section 8(e). Article XXVIII expressly provides that Sterling could subcontract out work performed by employees covered by the agreement, but conditioned that right to contracting out work to other employers having a collective bargaining agreement with the Optical Workers Union. Article XXVIII was not written as an agreement to protect employment of the employees covered by the agreement - a valid provision under the numerous decisions of the Board and the courts. On the contrary, Article XXVIII was written to govern the employers with whom Sterling could do business based on the other employer's contractual status with the Optical Workers Union - a clearly invalid provision under equally numerous judicial and Board decisions.

(con't. from page 15)

> employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . ."

The entire text is quoted in full in the Statutory Addendum to this Brief, infra, p. 1a-2a.

Having correctly decided the initial two basic legal principles, the District Court erroneously refused to delete the illegal condition of Article XXVIII - the requirement that all subcontracted work "shall be sent to Union establishments." Instead, without the citation of any legal authority, and wholly ignoring the cases cited by Sterling arising under Section 8(e) of the National Labor Relations Act, the District Court invalidated the entire Article. Indeed, the Court below argued that to excise only the illegal condition of Article XXVIII would sustain the validity of Sterling's actions as to the merits of the dispute - a matter which is for the arbitrator to decide. Compounding this error, the Court further reasoned that if only the illegal condition were deleted, then Sterling would not have violated the bargaining duty imposed by Section 8(a)(5) of the National Labor Relations Act - a matter which is manifestly within the jurisdiction of the National Labor Relations Board but which the District Court held was for the arbitrator, citing two inapposite cases arising under the National Labor Relations Act. And, in so doing, the Court below reached a result inconsistent with decisions arising under Section 8(e) of the National Labor Relations Act, contrary to the uniformity of collective bargaining agreements and federal labor law which Section 301 was designed to achieve.

ARGUMENT

POINT I

THE DISTRICT COURT, IN AN ACTION UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT TO COMPEL ARBITRATION PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT HAS JURISDICTION TO DETERMINE THE EXTENT OF LEGALITY OF THE "NO-SUBCONTRACTING" CLAUSE OF THE AGREEMENT UNDER SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT WHERE THAT CLAUSE UNDERLIES THE DISPUTE SOUGHT TO BE ARBITRATED

There can be no serious question the District Court rightly concluded that, in an action under Section 301 of the Labor Management Relations Act to compel arbitration under a collective bargaining agreement, the Court has jurisdiction to determine the legality of the "no-subcontracting" clause of the agreement under Section 8(e) of the National Labor Relations Act which underlies the dispute sought to be arbitrated. Todd Shipyards Corporation v. Industrial Union of Marine and Shipbuilding Workers of America, Local 39, AFL-CIO, 232 F. Supp. 589 (E.D.N.Y., 1964), aff'd. 344 F.2d 107 (2d Cir. 1965); El Paso Building & Construction Trades Council v. El Paso Chapter Associated General Contractors of America, 376 F.2d 797 (5th Cir. 1967); Paramount Bag Mfg. Co. v. Rubberized Novelty and Plastic Fabric Workers' Union, Local 98, I.L.G.W.U., 353 F. Supp. 1131 (E.D.N.Y. 1973). Indeed, the Courts have even more broadly held

that Section 301 confers upon the District Courts power to issue declaratory judgments concerning rights under a collective bargaining agreement. Black-Clawson Co., Inc. Paper Machine Division v. International Ass'n. of Machinists, Lodge 355, District 137, 313 F.2d 179, 181 (2d Cir. 1962) and cases cited therein; New Bedford Defense Products Div. v. Local 1113, United Automobile Workers, 160 F. Supp. 103, 109-10 (D. Mass. 1958), aff'd. 258 F.2d 522 (1st Cir. 1958); El Paso Building & Construction Trades Council v. El Paso Chapter Associated General Contractors of America, supra, and cases cited therein. See also Hays, Paul R., Labor Arbitration - A Dissenting View (Yale Univ. Press, 1966) at 94, notes 36 and 37.

The force of these decisions is further amplified by the cases holding that District Court jurisdiction under Section 301 of the Labor Management Relations Act is ousted neither by the availability of arbitration under the labor agreement (see cases cited immediately above) nor by the fact that the conduct in controversy is arguably, perhaps even concededly, an unfair labor practice within the primary jurisdiction of the National Labor Relations Board. See the leading case of Smith v. Evening News Ass'n., 371 U.S. 195 (1962), holding that the federal courts have concurrent jurisdiction in actions brought under Section 301 despite the fact that the wrong

alleged as the substance of the action might also constitute an unfair labor practice. Accord: Todd Shipyards Corporation v. Industrial Union of Marine and Shipbuilding Workers of America, Local 39, AFL-CIO, supra; El Paso Building & Construction Trades Council v. El Paso Chapter Associated General Contractors of America, supra; Paramount Bag Mfg. Co. v. Rubberized Novelty and Plastic Fabric Workers' Union, Local 98, I.L.G.W.U., supra.

From this abundant authority, perhaps the most pertinent is the decision of this Court in Todd Shipyard Corporation v. Industrial Union of Marine & Shipbuilding Workers of America, Local 39, AFL-CIO, supra, which arose in a procedural context strikingly similar to that of the instant case. There the union filed a grievance pursuant to the terms of its collective bargaining agreement with the employer, claiming a violation of the subcontracting provision. Thereupon, the employer instituted an action under Section 301 for a declaratory judgment that the subcontracting provision was illegal under Section 8(e) of the Act, and for an order staying all arbitration proceedings to the extent that such proceedings involved claims under the alleged illegal subcontracting provision. In opposing the employer's action, the union contended that the Court did not have jurisdiction to determine the legality of the subcontracting provision under Section 8(e) of the Act since that Section

states that it "shall be an unfair labor practice" to enter into the contractual provisions therein described; that before the contract can be denied enforceability, it must be found to be "an unfair labor practice" within that provision of the National Labor Relations Act; and that the Courts did not have jurisdiction to determine whether any act constitutes "an unfair labor practice" [232 F. Supp. at 591]. Judge Bartels rejected this argument in the following terms:

> "The fact that the resolution of the issue may also involve the determination of whether an unfair labor practice has been committed, will not deprive the Court of jurisdiction. The Supreme Court rejected this contention in Smith v. Evening News Ass'n., 1962, 371 U.S. 195, at page 197, 83 S.Ct. 267, at page 268, 9 L. Ed. 2d 246, stating: 'In Lucas Flour as well as in Atkinson the Court expressly refused to apply the pre-emption doctrine of the Garmon case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board.' See Textile Workers Union of America v. Lincoln Mills of Alabama, 1957, 353 U.S. 448, at 452, 77 S.Ct. 912, 1 L. Ed. 2d 972." [232 F. Supp. at 591]

The Court then proceeded to determine whether, under National Labor Relations Board and judicial decisions, the subcontracting clause in question violated Section 8(e). As a result of its examination of the precedents the Court concluded that, on the particular facts before it, the clause was valid [232 F. Supp. at 592-93].

On appeal, this Court affirmed, stating in language no less explicit:

> "The union argued below that primary jurisdiction in this case lies with the National Labor Relations Board. This argument was correctly rejected by the District Court since the federal courts have concurrent jurisdiction in actions brought under section 301 despite the fact that the wrong alleged as the substance of the action might also constitute an unfair labor practice. Smith v. Evening News Ass'n, 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962); Carey v. General Elec. Co., 315 F. 2d 499, 508 (2d Cir. 1963), cert. denied, 377 U.S. 908, 84 S. Ct. 1162, 12 L. Ed. 2d 179 (1964); Black-Clawson, Inc. v. International Ass'n of Machinists, 313 F. 2d 179 (2d Cir. 1962)." [344 F.2d at 108.]

Accord: El Paso Building & Construction Trades Council v. El Paso Chapter Associated General Contractors of America, supra; Paramount Bag Mfg. Co. v. Rubberized Novelty and Plastic Fabric Workers Union, Local 98, I.L.G.W.U., supra.

These decisions reflect the deliberate concern of Congress to make any clause violative of Section 8(e) unenforceable by agreement, coercion or judicial action at law or in equity for specific performance. Senator Barry Goldwater, "'as one of the Senate conferees who sat for 12 days in the conference on the labor bill between the House and Senate. . .'" [Legisl. Hist. of the Labor-Management Reporting and

and Disclosure Act of 1959, Vol. II at 1716, Note 2], analyzed the new Section 8(e) of the LMRA, as follows:

> "This means that such contractual clauses are per se illegal. It is unlawful for either party even to execute such an agreement, to insist that the other party bargain about or enter into it, to use any form of coercion or restraint - economic or otherwise - to compel the other party to enter into it or to live up to it even if his refusal to do so is in breach of a voluntary agreement to abide by the agreement, and finally, such breach does not constitute a good cause of action in a suit at law to recover damages for the breach or to secure specific performance of the agreement." (Ibid. at 1857; emphasis supplied.)

In light of this overwhelming authority, manifestly the District Court properly concluded that it had jurisdiction to determine the validity of Article XXVIII under Section 8(e) of the National Labor Relations Act. Indeed, it is far from clear that plaintiff seriously contended otherwise in the Court below.

POINT II

THE DISTRICT COURT PROPERLY CONCLUDED, AS A MATTER OF LAW, THAT THE "NO-SUBCONTRACTING" CLAUSE, "TO THE EXTENT THAT IT PERMITS SUBCONTRACTING [ONLY] TO 'UNION ESTABLISHMENTS' TO BE 'UNENFORCIBLE AND VOID'" UNDER SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT

Neither can it seriously be questioned that the Court below rightly concluded that Article XXVIII, as written, violates Section 8(e) of the National Labor Relations Act (supra, p. 15) and that "to the extent that it permits subcontracting [only] to 'union establishments' [Article XXVIII is] unenforcible and void" [JA 94a].[8] This holding by the Court below clearly accords with the consistent line of decisions by the National Labor Relations Board and the courts holding that agreements between an employer and a union which permit subcontracting, as does the agreement in the instant case, but which limit the choice of subcontractors to those which recognize and have collective bargaining agreements with that union, as the instant agreement also provides, are, to such extent, illegal

[8] The quoted language is from the Court's Memorandum of Decision. In its "Final Judgment" the Court noted that "paragraph XXVIII is violative of Section 8(e). . .and is null and void and of no effect..."As shown hereinafter, it is respectfully submitted that the quoted language from the Court's Memorandum is, in fact, the correct statement of the law.

under Section 8(e) and void and unenforceable as against public policy. Todd Shipyards Corporation v. Industrial Union of Marine and Shipbuilding Workers, Local 39, supra; El Paso Trades Council v. El Paso Chapter, Associated General Contractors Ass'n., supra; Bakery Wagon Drivers and Salesmen, Local Union No. 484 v. NLRB, 321 F.2d 353 (D.C. Cir. 1963), enf'g. 137 N.L.R.B. 987 (1962); District No. 9, International Association of Machinists, AFL-CIO (Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc.), 134 N.L.R.B. 1354 (1961), enf'd. 315 F.2d 33 (D.C. Cir. 1962); Milk Drivers and Dairy Employees, Local Union No. 537 (Sealtest Foods, A Division of National Dairy Products Corporation), 147 N.L.R.B. 230 (1964); Teamsters, Chauffeurs, Warehousemen & Helpers of America (Reynolds Electrical and Engineering Co., Inc.), 154 N.L.R.B. 67 (1965).

Under these cases, the crucial test of validity under Section 8(e), turns upon whether the provision is designed to achieve a primary objective of job protection for the employees covered by the agreement or a secondary objective addressed to the labor relations of the subcontractor. As succinctly summarized by this Court in the Todd Shipyards Corp. case:

> "Distinctions must be made between contractual prohibitions on subcontracting which merely serve as legitimate job protection devices

> and those which go farther to accomplish ends Congress meant to prohibit under 8(e). Compare, Meat & Highway Drivers' Union v. NLRB, 118 U.S.App.D.C. 287, 335 F.2d 709, 712-714 (1964), with NLRB v. Teamsters Union, Local 294, 342 F.2d 18 (2d Cir. 1965); District 9, Int'l Ass'n of Machinists v. NLRB, 114 U.S. App.D.C. 287, 315 F.2d 33 (1962). In the present case Article XXVII neither on its face nor as construed by the parties blacklists "specified employers or groups of employers because their products or labor policies are objectionable to the Union." Cox, The New Hot-Cargo and Secondary Boycott Sections: A Critical Analysis, 44 Minn.L.Rev. 257, 259 (1959). The contractual prohibitions here in dispute merely insure that Todd will not be able to avoid wage, job security and other obligations contained in its agreement with the union." [344 F.2d at 109]

In sharp contrast with the subcontracting clause involved in that case, Article XXVIII of Sterling's labor agreement with the Optical Workers Union is explicitly directed to the labor relations of the subcontractors with which Sterling might seek to do business, wholly without regard to the effect upon the employees covered by the labor agreement.

Article XXVIII states, in its entirety:

> "It is agreed by and between the Parties that whereas the Employer send [sic] work out to be done in different establishments under different managements, therefore, upon signing of this Agreement all said work shall be sent to Union establishments." [JA 19a, 74a]

Thus, by its express language, Article XXVIII permits subcontracting by recognizing that ". . .the

Employer sends[s] work out to be done in different establishments under different managements." Indeed, this very same language has appeared in every agreement between the parties since 1954, when the first agreement was executed [JA 50a]. That initial agreement between the parties, provided in Article XXVIII, inter alia, that "the Employer sends work out to be done in different establishments under different managements. . ."[9] [JA 66a]. The breadth of this provision is, moreover, revealed by the scope of Article I covering "all employees [of Sterling]. . . within the radius of fifty (50) miles from Columbus Circle", [JA 9a] which includes Sterling's numerous optical stores in the Greater New York area, as well as the warehouse and optical laboratory at Brooklyn, New York. In other words, Article XXVIII accords Sterling's right to continue subcontracting without any reference to the employees or the jobs covered by the agreement. And, so far as it appears on its face, Sterling could contract out all the work covered by the labor agreement without violating any job protection afforded by Article XXVIII.

The sole restriction upon Sterling's right to

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[9] Obviously, in view of this undisputed history, the omission of the "s" from the word "send" in the current agreement is without legal significance.

send bargaining unit work to other employers is the requirement that the other employers must be "Union establishments", an establishment organized by the United Optical Workers.[10] Article XXVIII, on its face, contains no limitations as to the type of work which may be sent by Sterling to other employers. Neither is there any stated limitation in Article XXVIII as to the amount of bargaining unit work which Sterling may send to other employers. Indeed, most sharply stated, Sterling could send out all of its work to employers having a collective bargaining agreement with the United Optical Workers and commit no violation of Article XXVIII as it is presently worded.

Under these circumstances there can be no dispute regarding the operative effect of Article XXVIII on September 28, 1973, when Sterling sub-contracted certain of the laboratory work then being performed by its employees at the Brooklyn plant. Regardless of the artful manner in which the pleadings were drawn in the court below,[11] Article XXVIII clearly

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[10] As already noted, supra, p. 11, note 6, the preamble of the collective bargaining agreement states that "United Optical Workers Union, Local #408, IUE, AFL-CIO, of 200 Park Avenue, South, New York, New York, hereinafter referred to as the 'Union'" [JA 9a].

[11] The Complaint carefully omits any reference to the contracting out of work as a violation of Article XXVIII, (con't. on page 29)

governs the dispute. Just as clearly, the condition of sending work to "Union establishment" violates Section 8(e) of the National Labor Relations Act.

Closely in point is the case of District 9, International Association of Machinists, supra, wherein the Board found, and the Court agreed, that a provision remarkably similar in language and identical in substance to Article XXVIII of the Agreement here involved was within the prohibition of Section 8(e). The provision in that case provided:

> "Whenever the Employer finds it feasible to send work out that comes under the jurisdiction of the Union and this contract, perference must be given to such shop or subcontractors approved or having contracts with District No. 9, International Association of Machinists." (134 N.L.R.B. at 1356.)

In holding this provision unlawful under Section 8(e), the Board concluded:

> "The contract clause which prohibits, limits, or restricts subcontracting of work ordinarily performed by employees in the unit covered by the contract is fairly common in modern collective bargaining agreements. [Footnote omitted.] Generally, the purpose and object of such restrictions is to preserve the jobs

(con't. from page 28)

although the Complaint cites the immediately preceding Article and the two immediately succeeding Articles [JA 5a]. And, in the demand for arbitration [JA 26a-28a], the alleged violation of Article XXVIII is listed as the fifteenth and final alleged violation.

> and job rights of the employees in the unit covered by the contract. We do not in this case decide whether such contract clauses are lawful or unlawful. However, Article XXIX is more than a restriction on subcontracting for the preservation of jobs and job rights of employees. Article XXIX allows subcontracting of work ordinarily performed by employees covered by the contract. It limits the persons with whom the Employer can do business. We see no meaningful distinction between a contract which prohibits an employer from handling products produced by a nonunion firm and a contract which causes an employer to cease subcontracting work to a nonunion firm. Both clearly contravene Section 8(e). We find, therefore, that Article XXIX, as written. . . falls within the proscriptive purview of Section 8(e) of the Act." (134 N.L.R.B. at 1358; footnote omitted; emphasis in text.)

Again, in Bakery Wagon Drivers and Salesmen, Local Union No. 484 v. N.L.R.B., 321 F.2d 353 (D.C. Cir. 1963), enf'g. 137 N.L.R.B. 987 (1962), the Court enforced a Board decision that a provision limiting subcontracting to only those employers holding contracts with the Union was unlawful, recognizing that:

> "The Board has held that a contract which prohibits all subcontracting is legal as a legitimate device to protect the economic integrity of the bargaining unit [footnote omitted]. The Board has also held, and we recently affirmed [footnote omitted], that contracts which limit subcontracting to employers having a contract with the same union are illegal. . ." (321 F.2d at 357; emphasis in text)

Therefore, it is beyond serious question, as correctly stated by the Court below in its Memorandum of

Decision that the "no-subcontracting" clause of the collective bargaining agreement "to the extent that it permits subcontracting [only] to 'union establishments' [is] unenforcible and void" under Section 8(e) of the National Labor Relations Act.

POINT III

THE DISTRICT COURT ERRED IN REFUSING TO EXCISE THE ILLEGAL LIMITATION OF THE "NO-SUBCONTRACTING" CLAUSE OF THE COLLECTIVE BARGAINING AGREEMENT AND INSTEAD INVALIDATING THE ENTIRE "NO-SUBCONTRACTING" CLAUSE ON THE GROUND THAT EXCISION WOULD EXCUSE THE COMPANY FROM BARGAINING WITH THE UNION, A MATTER WHICH THE COURT FURTHER ERRONEOUSLY HELD IS RESERVED TO THE ARBITRATOR

After properly resolving the District Court's jurisdiction under Section 301 of the Labor Management Relations Act to determine the validity of Article XXVIII in the light of Section 8(e) of the National Labor Relations Act and further rightly concluding that "to the extent" Article XXVIII limits "subcontracting to union establishments" it is "unenforceable and void," the Court below proceeded inconsistently to void Article XXVIII in its entirety. In so doing, the Court below ignored the explicit language of Section 8(e) as well as the abundant legal authority that a contractual provision containing portions which are valid under Section 8(e) and other portions which are invalid thereunder, should be voided only to the extent of excising the invalid portions. Once this excision has been made, whether the employer's actions violated Article XXVIII, or any other provision of the contract, are matters subject to arbitration under the contract and should be left for the arbitrator to decide, not the Court.

A. The Applicable Legal Principles Governing Excision under Section 8(e)

From the clear unequivocal language of Section 8(e),[12] any contract or agreement containing a provision to cease or refrain from, inter alia, doing business with any other person "shall be to such extent unenforcible and void." To void an entire provision containing an illegal condition, as did the Court below, is manifestly contrary to the express statutory wording. This is particularly so inasmuch as the District Court properly stated the statutory standard in its Memorandum of Decision [JA 94a].[13]

The District Court's action in this respect is further contrary to the numerous decisions of the National Labor Relations Board and the courts under Section 8(e) which have consistently excised only the illegal portion of an agreement while leaving the valid portion intact.[14]

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[12]The full language of Section 8(e) is set forth in the Statutory Addendum to this Brief, infra, pp. 1a-2a.

[13]"The court finds the agreement, to the extent that it permits subcontracting to 'union establishments' to be 'unenforcible and void'". (emphasis supplied) [JA 94a].

[14]Even before enactment of Section 8(e), in the leading case of NLRB v. Rockaway News Supply Company, Inc., 345 U.S. 71 (1953), the Supreme Court of the United States recognized the principle that unlawful provisions of a collective bargaining agreement must be excised, leaving intact the remaining valid terms of the agreement:

". . .The relationship must be governed by
(con't. on page 34)

For example, in Lewis v. Seanor Coal Company, 382 F.2d 437 (3rd Cir. 1967), cert. den. sub. nom. Seanor Coal Co. v. Lewis, 390 U.S. 947 (1968), the provision of a collective bargaining agreement required double royalty payments on work acquired from "nonsignatory operators." The Court found this provision clearly invalid and unenforceable under Section 8(e). Nevertheless, the Court noted that its finding of invalidity did not affect any of the remaining, valid provisions of the agreement:

> "Section 8(e) does not invalidate an entire collective bargaining agreement because it contains a 'hot cargo' provision; the statute merely makes a contract with such a provision unenforceable and void to the extent that it contains the 'hot cargo' provision." (382 F.2d at 440; emphasis supplied.)

Again, in Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 631, IBT (Reynolds Electrical and Engineering Co., Inc.) 154 N.L.R.B. 67 (1965), faced with several illegal subcontracting clauses in a labor agreement, the Board found:

(con't. from page 33)

> some contractual terms. There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained. The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain, where the excess may be severed and separately condemned as it can here." [345 U.S. at 79; emphasis supplied]

> ". . .[Article I], Sections D and E by their explicit terms, and Section F implicitly, permit the subcontracting of unit work to companies observing all the terms of the instant contract which includes a clause requiring recognition of the Union . . .Contracts which permit subcontracting, but attempt to limit the choice of subcontractors to those which recognize and have collective bargaining agreements with a union, have long been held to be violative of Section 8(e). [Citations omitted.]
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> * * *
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> . . .Accordingly, to the extent that the foregoing provisions require, or are interpreted by Respondent as requiring, that [the Employer] may only contract such delivery work to firms employing [the Union's] members or members of a sister local, the provisions are proscribed by Section 8(e) of the Act." (154 N.L.R.B. at 69-70; emphasis supplied and in original)

Accordingly, the Board left the valid subcontracting provisions intact but ordered the Union to cease and desist from:

> "Giving effect to, enforcing or otherwise entering into Article I, Section D, E and F of the Labor Agreement between it and the. . .[Employers]. . .to the extent found unlawful herein." (154 N.L.R.B. at 72; emphasis supplied.)

Just as separate contractual provisions contrary to Section 8(e) are "unenforceable and void" to the extent that they contravene Section 8(e), unlawful portions of partially-valid clauses must be excised, leaving the remainder of those clauses as agreed upon by the parties. This precise question of a partially-valid clause was presented to the Court of Appeals in Truck Drivers Union

Local No. 413 v. NLRB, 334 F.2d 539 (D.C. Cir. 1964), cert. den. 379 U.S. 916 (1964) where the Court, in reviewing various provisions of a collective bargaining agreement in light of Section 8(e) noted the appropriate remedy to be applied in the case of partially-valid clauses:

> "There remains the question of appropriate relief. As to some sections of the contract, we have found the clauses to have a valid scope of operation under the law, but to be prohibited by law from operating outside that scope. Though the Board's decree is ambiguous, a section of its opinion suggests that in such a situation of partially-valid clauses, the entire clauses as written should be struck down. If this is the Board's view, we do not agree. (footnote omitted)
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> * * *
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> "We therefore conclude that a decree should be drafted condemning the challenged contract clauses only to the extent found unlawful by this court." (334 F.2d at 549-50; emphasis supplied.)

Even more closely in point is Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees, Local Union No. 710, IBT v. NLRB, 335 F.2d 709 (D.C. Cir. 1964). In that case, the contract contained the following provision:

> "Livestock, meat and meat products for delivery by truck to a distance not exceeding 50 miles from the Chicago Stock Yards, whether to final destination or point of transfer, shall be delivered by the Company in their own equipment except when there is a lack of equipment at individual plants or branches, and then all effort will be made to contract a cartage company who employs members of Local No. 710. * * *" (Emphasis supplied in original; footnote omitted; 335 F.2d at 717).

The Board order had condemned the entire clause because of the illegal portion (which is underlined). On appeal, the union argued that the objectionable portion should be excised, "leaving the remainder of the clause intact as a viable promise capable of enforcement in keeping with the sense of the contract" (Ibid). Upholding the union's contention, the Court expressly disagreed with the Board's condemnation of the entire clause, stating:

> ". . .Deletion, then, would leave the total collective bargaining agreement in a state close to the actual agreement of the parties. And deletion would satisfy totally the requirements of §8(e). Accordingly, we hold that the Board should not invalidate more of the contract than is unlawful, 'where the excess may be severed and separately condemned as it can here.'" (Citing Rockaway News, supra.) (335 F.2d at 717; emphasis supplied; footnote omitted)

To the same effect see, e.g., Sheet Metal Workers, Local 223 (Continental Air Filters Co.), 196 N.L.R.B. No. 12, 80 LRRM 1021 (1972) ["insofar as" unlawful]; Retail Clerks International Assn. Local Union No. 1288 v. NLRB, 390 F.2d 858 (D.C. Cir. 1968) ["the objectionable portion only"]; NLRB v. Milk Drivers' Union, Local No. 753, IBT, 392 F.2d 845, 846 (7th Cir. 1968), enf'g. 159 N.L.R.B. 1459 (1966) ["insofar as (the agreement) violates Section 8(e)"]; Employing Lithographers of Greater Miami v. NLRB, 301 F.2d 20 (5th Cir. 1962); Sheet Metal Workers Union Local 216 (Associated Pipe and Fitting Manufacturers et al.),

172 N.L.R.B. 35 (1968) ["insofar as" contrary to Section 8(e)]; General Teamsters, Local 982 (Associated Independent Owner-Operators, Inc.), 181 N.L.R.B. 515 (1970), enf'd. 450 F.2d 1322 (D.C. Cir. 1971) ["to the extent found unlawful"].

B. Excision of the Illegal Limitation of Contracting only to "Union Establishments" - Not Total Voidance - Accords Most Closely With the Expressed Intent of Article XXVIII

In this case, as mentioned, Article XXVIII of the collective bargaining agreement explicity recognizes the right of Sterling to "send work out to be done in different establishments under different managements". Other than the reference in that Article to the practice of Sterling to contract out work, the language contains no reference to the type of work or the amount of work which may be sent out by Sterling to be performed by other employers. Neither is there any limitation upon Sterling's right to contract out bargaining unit work grounded upon a reduction of employment among the employees covered by the contract. Indeed, as negotiated by Sterling and the Optical Workers Union, Article XXVIII by its terms would permit Sterling to send all of its work to be performed by other employers provided only that the other employers had a contract or collective bargaining relationship with the Optical Workers Union. But that sole restriction - and the portion unenforceable and void under Section 8(e) - is that "all said

work shall be sent to Union [i.e., Local 408] establishments."

Under the line of cases discussed above, the right of Sterling to "send work out" should remain intact, without the illegal restriction, thereby leaving the agreement "close to the actual agreement of the parties" which they negotiated in good faith at the bargaining table, but satisfying the requirements of Section 8(e). Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees, Local Union No. 710, IBT v. NLRB, supra.

Conversely, to delete Article XXVIII as did the Court below, wholly negates the bargain which Sterling and the Optical Workers Union negotiated. For it is undisputed that the parties did negotiate on the issue of subcontracting out work; and that the negotiations concluded with an agreement recognizing Sterling's right to "send work out to be done in different establishments". And the Optical Workers Union's recognition of this right is fully consistent with the fact that Article XXVII accords Sterling the unilateral right "to close a Branch" (subject only to certain transfer rights of employees) and Article XXV(i), in which the Optical Workers Union recognizes that Sterling retains those "rights as are usually Management's function" [JA 18a-19a]. Invalidation of Article XXVIII would

ignore both actual practice as well as the fact that the parties did negotiate a provision governing subcontracting. "The actual existence" of this provision, to paraphrase the Supreme Court in NLRB v. Rockaway News Supply Company, supra, 345 U.S. at 77, "is an operative fact which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."

In short, only by leaving Article XXVIII intact, but deleting the illegal condition contravening Section 8(e), is the agreement left as close to the actual intent of the parties as the law permits.

C. The Error in the Reasoning of the District Court

Although not altogether clear from its Memorandum of Decision, the District Court's refusal to excise only the illegal limitation is apparently based on two grounds: that if only the illegal limitation of Article XXVIII were excised, Sterling would have "the unlimited right to subcontract work previously performed by laboratory employees" [JA 95a];[15] and that, such excision would "free [Sterling] of any obligation imposed under Section 8(a)(5)" of the National Labor Relations Act to bargain collectively with the Optical Workers Union concerning subcontracting, which

[15]As above noted (p. 4), Sterling at no time made such an argument in the Court below, but instead urged that such determination is for the arbitrator.

the Court held is "for the arbitrator" [Ibid]. Neither of these grounds are, it is submitted, valid under the law.

With respect to the first ground, it is clear that the District Court has intruded into the area reserved to the arbitrator, contrary to the admonition of the Supreme Court and this Court, against becoming "entangled in the construction of the substantive provisions of a labor agreement. . ." United Steelworkers of America v. Warrior & Gulf Navigation Company, 363 U.S. 574, 585 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). See also International Union of Electrical, Radio and Machine Workers, AFL-CIO v. General Electric Company, 332 F.2d 485, 489-90 (2d Cir. 1964), cert. den., 379 U.S. 928 (1964); Local 12298, District 50, United Mine Workers of America et al. v. Bridgeport Gas Company, 328 F.2d 381, 384 (2d Cir. 1964); International Longshoremen's Association v. New York Shipping Association, Inc., 403 F.2d 807 (2d Cir. 1968). For the District Court intruded into this area explicitly reserved to the arbitrator by concluding that excision of the illegal condition affords Sterling the unlimited right to contract out work.

This fundamental error is clearly demonstrated by International Union of Electrical, Radio & Machine

Workers, AFL-CIO v. General Electric Company, supra, where the employer sought to resist arbitration of a contracting dispute. Although conceding that the grievance was prima facie within the coverage of the arbitration clause, the employer contended that the inclusion of a "wrap-up" clause in the agreement demonstrated the parties' intent to exclude subcontracting grievances from arbitration. Upholding the District Court's rejection of evidence in support of this contention, the Court of Appeals stated:

> ". . .What the company has done, under the guise of labeling a wrap-up clause as some sort of exclusionary clause, is to attempt to persuade us to decide that the grievance is not arbitrable because the grievance is groundless inasmuch as no substantive provision of the collective bargaining agreement, according to the company, forbids or restricts subcontracting. But whether a certain brand of company conduct is prohibited by a provision of a collective bargaining agreement will always be the ultimate question which the grievance itself will present; and whether this company and union ever agreed to permit unrestricted subcontracting of work, an issue upon which the presence or absence of a wrap-up clause would seem to have little if any bearing [footnote omitted], is the very question which the arbitrator will have to decide. For us to yield to the urgings of the company and decide it ourselves would be to ignore the admonition contained in the Warrior & Gulf case that courts should not become 'entangled in the construction of the substantive provisions of a labor agreement.' 363 U.S. at 585, 80 S. Ct. at 1354." [Emphasis supplied] [332 F.2d at 489-90].

Similarly, in Local 12298, District 50, United Mine Workers of America, et al. v. Bridgeport Gas Company, 328 F.2d 381 (2d Cir. 1964), the Court reversed the District Court's denial of a petition to compel arbitration on the ground that, inter alia, the dispute did not relate to "rates of pay, wages, hours of employment and other conditions of employment" and, hence, did not come within the scope of matters to be submitted to arbitration, as evidenced by the bargaining history between the parties that the issue was an exclusive function of management. In reversing, this Court again cautioned that:

> ". . .the court's role is confined to ascertaining whether the party seeking to compel arbitration is making a claim which on its face is covered by the language of the grievance arbitration clause."
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> * * *
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> "Here the company has presented no 'forceful evidence of a purpose to exclude the claim from arbitration,' and we decline to become 'entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.' United Steelworkers of America, AFL-CIO v. Warrior & Gulf Nav. Co., supra, 363 U.S. at 585, 80 S. Ct. at 1354, 4 L. Ed.2d 1409." Id. at 383-84.

Indeed, the decision of the District Court appears to be premised on a resurrection of the Cutler-Hammer

doctrine,[16] explicitly rejected by the Supreme Court in United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 567 (1960). As stated therein by the Supreme Court, the Cutler-Hammer doctrine was to the effect that ". . .If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." The proper rule, the Supreme Court further stated, is that the "agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them meritorious." [Ibid.]

So here, the Court may not, consistent with the provisions of Section 8(e), enforce Article XXVIII as written. But having excised the illegal condition of Article XXVIII - as if the Article had been so written - the Court's task is complete under Section 301, except to order arbitration of the extent to which Sterling's action in contracting out work may have violated Article XXVIII, as modified by the Court.

No more soundly grounded is the second reason of the District Court for refusing to delete only the

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[16] International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917 (1st Dept. 1947), aff'd 297 N.Y. 519 (1947).

illegal condition, viz., "[w]hether Sterling has performed its statutory obligation and the consequences of any failure to do so are matters for the arbitrator" [JA 95a], citing NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961) and Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963). Nothing in these cases support the legal proposition of the District Court.

NLRB v. Rapid Bindery, Inc. was an enforcement action brought by the National Labor Relations Board against Rapid for failure to fulfill its statutory obligations under Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended. The decision makes no mention whatsoever of arbitration, and is concerned entirely with a discussion of whether the Board correctly found that the employer had failed to fulfill its statutory obligations under said Sections of that Act.

In the second case cited by the Court below, Hawaii Meat Co. v. NLRB, supra, the Court there held that the National Labor Relations Board improperly concluded that the employer had violated Sections 8(a)(3) and (5) of the National Labor Relations Act by implementing its decision to subcontract certain delivery work in the face of a strike by the union, without first bargaining with the striking union representing the employees.

Thus, neither of the cases supports the proposition

for which they are cited. In any event, although no cases have been found on this point, it would appear that the question of whether, following deletion of the illegal conditions of Article XXVIII, renegotiation of that Article is required by Section 8(a)(5) of the National Labor Relations Act, is a matter for the Board to decide. As the Court of Appeals noted in Meat and Highway Drivers, Dockmen, etc., Local 710 v. NLRB, supra:

> "Whether renegotiation of part or all of a contract would be proper after such deletion is for the Board, in the first instance, to decide." [335 F.2d at 717, note 25]

There is, therefore, no legal warrant in the Memorandum of Decision of the Court below for refusing to excise the illegal condition of Article XXVIII so as to conform that Article to Section 8(e) of the National Labor Relations Act. The long line of cases discussed supra, dictates a contrary result so as to preserve, to the extent legally permissable, the right of Sterling to send work out to different establishments pursuant to Article XXVIII.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Judgment of the Court below should be modified to the extent that the unquestionably unlawful condition of Article XXVIII - the requirement that all subcontracted work "shall be sent to Union establishments" - be excised as clearly "unenforceable and void" while leaving the balance of Article XXVIII intact.

In specific terms, this Court should declare that Article XXVIII is valid and enforceable if revised so as to read:

> "It is agreed by and between the Parties that whereas the Employer sends work out to be done in different establishments under different managements, therefore, upon signing of this Agreement all said work shall be sent to such establishments."

Alternatively, this Court should hold that Article XXVIII will read as follows:

> "It is agreed by and between the Parties that [whereas] the Employer sends work out to be done in different establishments under different managements."

Following this excision pursuant to Section 8(e) of the National Labor Relations Act, this Court should order that any and all issues as to the alleged violations by Sterling of the collective bargaining agreement, including Article XXVIII as revised by this Court, be submitted to arbitration in accordance with the agreement

of the parties, pursuant to the demand for arbitration, dated September 24, 1973 of the Optical Workers Union.

It is respectfully submitted that in this manner this Court will be following the clear mandate of the law, as expressed by Congress in Section 8(e) of the National Labor Relations Act and by the Courts in a consistent and unbroken line of cases under Section 301 of the Labor Management Relations Act.

Respectfully submitted,

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March 8, 1974

STATUTORY ADDENDUM

STATUTORY ADDENDUM

National Labor Relations Act, as amended, Section 8(a)(5), 29 U.S.C. 158(a)(5):

(a) It shall be an unfair labor practice for an employer. . .

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

National Labor Relations Act, as amended, Section 8(e), 29 U.S.C. 158(e):

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person"

> shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Labor Management Relations Act, as amended, Section 301, 29 U.S.C. 185(a):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or - between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Declaratory Judgments, 28 U.S.C. 2201:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Declaratory Judgments, 28 U.S.C. 2202:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.